

**FAUQUIER COUNTY
OFFICE OF THE COUNTY ATTORNEY**

MEMORANDUM

TO: Caroly Bowen, Zoning Administrator
FROM: Kevin Burke, Deputy County Attorney
DATE: September 19, 2002
RE: Affordable Housing

This memorandum is in response to your inquiry regarding whether the County can mandate affordable housing. Affordable housing programs in Fauquier and most other Counties are authorized by Section 15.2-2305 of the Code of Virginia. I have attached this code section at the end of this memorandum. This code section does not afford statutory authority for the County to implement a mandatory affordable housing program. Availability of affordable housing may be a consideration with respect to the grant or denial of a rezoning, however, and it is permissible to attempt to negotiate a rezoning in such a way as to encourage proffers which provide for affordable housing. Other types of incentive based programs are also permissible. I have included an opinion of the Virginia Attorney General which addresses this issue in some detail.

A provision of the Code of Virginia (Section 15.2-2304) has been interpreted to permit Loudoun, Albemarle and Fairfax Counties to adopt mandatory affordable housing programs. Albemarle and Loudoun County were added to this Code Section in 2002. In order to require mandatory affordable housing, an amendment to this Code provision adding Fauquier would be required. The Section is as follows:

§ 15.2-2304. Affordable dwelling unit ordinances in certain counties.

In furtherance of the purpose of providing affordable shelter for all residents of the Commonwealth, the governing bodies of any county where the urban county executive form of government or the county manager plan of government is in effect and the Counties of Albemarle and Loudoun, may by amendment to the zoning ordinances of such counties provide for an affordable housing dwelling unit program. The program shall address housing needs, promote a full range of housing choices, and encourage the construction and continued existence of moderately priced housing by providing for optional increases in density in order to reduce land costs for such moderately priced housing. Any project that is subject to an affordable housing dwelling unit program adopted pursuant to this section shall not be subject to an additional requirement outside of such program to contribute to a county housing fund.

Any local ordinance of any other locality providing optional increases in density for provision of low and moderate income housing adopted before December 31, 1988, shall continue in full force and effect.

(1989, cc. 634, 748, § 15.1-491.8; 1990, cc. 591, 834; 1991, c. 599; 1997, cc. 587, 607; 2001, cc. 18, 313; 2002, c. 151.)

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

Locality may amend its zoning ordinance to provide for affordable housing dwelling unit program and to grant incentives to encourage developers' participation in program. Locality may establish eligibility threshold for developers and impose mandatory conditions on participating developers that further purposes of program. Developers' participation in program is optional.

Mr. Larry W. Davis

County Attorney for Albemarle County

May 29, 1998

You ask whether a county may mandate that a proposed development that satisfies the conditions of § 15.2-2305(B)(2)¹ of the *Code of Virginia* be subject to the county's affordable housing dwelling unit program.

Section 15.2-2305(A) authorizes a locality to amend its zoning ordinance to provide for an affordable housing dwelling unit program.² Section 15.2-2305(B) contains the regulations and provisions that a locality may include in such an ordinance. Section 15.2-2305(B)(2) states that the ordinance may include a regulation or provision

[f]or application of the requirements of an affordable housing dwelling unit program to any site, as defined by the locality, or a portion thereof at one location which is the subject of an application for rezoning or special exception or, at the discretion of the local governing body, site plan or subdivision plat which yields, as submitted by the applicant, fifty or more dwelling units at an equivalent density greater than one unit per acre and which is located within an approved sewer area.

Section 15.2-2305(B)(3) through (7) relates to increases in the "developable" density of the site subject to the ordinance and the percentage of the units on the site that must be affordable dwelling units. Section 15.2-2305(D) and (E) contains provisions that must be included in the ordinances of a locality that establishes an affordable housing dwelling unit program.

In your written opinion,³ you conclude that, if a development satisfies a zoning provision enacted in accordance with § 15.2-2305(B)(2),⁴ participation in the affordable housing dwelling unit program would be optional with the developer. In your view, § 15.2-2305(B)(2) identifies an

eligibility threshold for the locality to establish in order for a developer to participate in the locality's affordable housing development program. While a developer who chooses to participate in the locality's program would have to comply with all of the particular requirements of the locality's program, the statute does not require that all developers who meet the threshold must participate in the program. You believe this view to be consistent with the language of § 15.2-2305(A) stating that the purpose of the program is to "*encourage* the construction and continued existence of moderately priced housing by providing for optional increases in density in order to reduce land costs for such moderately priced housing" and providing that a locality may "*offer incentives* other than density increases ... as the governing body deems appropriate to *encourage* the provision of affordable housing." (Emphasis added.) You state that you question the correctness of your conclusion because you have been informed by affordable housing advocates that the General Assembly intended § 15.2-2305 to enable mandatory affordable housing requirements.⁵

I agree with your conclusion that, if a development satisfies the conditions of § 15.2-2305(B)(2), participation in an affordable dwelling unit program is optional with the developer. This conclusion is not inconsistent, however, with the view that § 15.2-2305 is intended to enable mandatory affordable housing requirements.

The legislative intent of a statute is to be determined by a review and analysis of the language of the statute, with the words in the statute given their ordinary meaning unless the context requires otherwise.⁶ Section 15.2-2305(A) provides that a locality "*may*^[7] ... *provide for* an affordable housing dwelling unit program." (Emphasis added.) The ordinary meaning of the word "provide" is "[t]o furnish; supply ... [t]o make ready; prepare ... [t]o make available."⁸ These meanings contain no mandatory connotation. Neither is there any language in § 15.2-2305(B) or § 15.2-2305(B)(2) suggesting that participation in such a program is mandatory.

Section 15.2-2305(B) does, however, enable a locality to impose mandatory conditions on developers who choose to participate in the program. For example, § 15.2-2305(B)(3) authorizes the locality to include a provision "requiring up to twelve and one-half percent of the total units approved ... to be affordable dwelling units." In addition, § 15.2-2305(D) and (E) imposes mandatory requirements on the locality itself if the locality chooses to provide an affordable housing development program. For example, § 15.2-2305(E)(5) requires the local government to enact provisions "[f]or the establishment of jurisdiction-wide affordable dwelling unit rental prices."

A fundamental principle of statutory construction is that statutes are to be read as a whole, with every provision given effect, if possible.⁹ Section 15.2-2305 read as a whole authorizes a locality, by amendment to its zoning ordinance, to provide for an affordable housing dwelling unit program and to grant incentives to developers to encourage them to participate in the program. In exchange for these incentives, the General Assembly enables a locality to impose requirements on developers who choose to participate that will further the purposes of an affordable dwelling unit program.

¹Your inquiry of August 4, 1997, pertains to repealed § 15.1-491.9, which has been replaced by § 15.2-2305. *See* 1997 Va. Acts ch. 587, at 976, 1171-73 (effective Dec. 1, 1997).

²An affordable dwelling unit ordinance in any county with the urban county executive form of government and any county with a population between 85,000 and 90,000 is governed by § 15.2-2304 (repealed § 15.1-491.8) rather than § 15.2-2305 (repealed § 15.1-491.9).

³Section 2.1-118 requires that any request by a county attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

⁴Your inquiry pertains to repealed § 15.1-491.9(B)(2). *See supra* note 1.

⁵You attach a portion of a 1988 Annual Report to the Governor and the General Assembly of Virginia by the Virginia Housing Study Commission commenting on the inadequacy of the Fairfax County voluntary programs to meet the housing crisis in Fairfax and recommending the adoption of legislation permitting Fairfax County to adopt ordinances requiring that the density of units within a development be increased in return for providing a minimum percentage of affordable housing units.

⁶*Grant v. Commonwealth*, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982); 1995 Op. Va. Att'y Gen. 162, 163.

⁷"May" should be given its ordinary meaning intended by the General Assembly, i.e., "permission, importing discretion." *Masters v. Hart*, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949).

⁸The American Heritage Dictionary 997 (2d c. ed. 1985).

⁹*Gallagher v. Commonwealth*, 205 Va. 666, 669, 139 S.E.2d 37, 39 (1964); Op. Va. Att'y Gen.: 1996 at 144, 145; 1993 at 173, 174.

§ 15.2-2305. Affordable dwelling unit ordinances.

A. In furtherance of the purpose of providing affordable shelter for all residents of the Commonwealth, the governing body of any county, other than counties to which § [15.2-2304](#) applies, city or town may by amendment to the zoning ordinances of such locality provide for an affordable housing dwelling unit program. Such program shall address housing needs, promote a full range of housing choices, and encourage the construction and continued existence of moderately priced housing by providing for optional increases in density in order to reduce land costs for such moderately priced housing. Any local ordinance of any locality providing optional increases in density for provision of low and moderate income housing adopted before December 31, 1988, shall continue in full force and effect. Any local ordinance may authorize the governing body to (i) establish qualifying jurisdiction-wide affordable dwelling unit sales prices based on local market conditions, (ii) establish jurisdiction-wide affordable dwelling unit qualifying income guidelines, and (iii) offer incentives other than density increases, such as reductions or waiver of permit, development, and infrastructure fees, as the governing body deems appropriate to encourage the provision of affordable housing. Counties to which § 15.2-2304 applies shall be governed by the provisions of § [15.2-2304](#) for purposes of the adoption of an affordable dwelling unit ordinance.

B. A zoning ordinance establishing an affordable housing dwelling unit program may include, among other things, reasonable regulations and provisions as to any or all of the following:

1. For a definition of affordable housing and affordable dwelling units.
2. For application of the requirements of an affordable housing dwelling unit program to any site, as defined by the locality, or a portion thereof at one location which is the subject of an application for rezoning or special exception or, at the discretion of the local governing body, site plan or subdivision plat which yields, as submitted by the applicant, fifty or more dwelling units at an equivalent density greater than one unit per acre and which is located within an approved sewer area.
3. For an increase of up to twenty percent in the developable density of each site subject to the ordinance and for a provision requiring up to twelve and one-half percent of the total units approved, including the optional density increase, to be affordable dwelling units, as defined in the ordinance. In the event a twenty percent increase is not achieved, the percentage of affordable dwelling units required shall maintain the same ratio of twenty percent to twelve and one-half percent.
4. For increases by up to twenty percent of the density or of the lower and upper end of the density range set forth in the comprehensive plan of such locality applicable to rezoning and special exception applications that request approval of single family detached dwelling units or single family attached dwelling units, when such applications are approved after the effective date of a local affordable housing zoning ordinance amendment.
5. For a requirement that not less than twelve and one-half percent of the total number of dwelling units approved pursuant to a zoning ordinance amendment enacted pursuant to subdivision B 4 of this section shall be affordable dwelling units, as defined by the local zoning ordinance unless reduced by the twenty to twelve and one-half percent ratio pursuant to subdivision B 3 of this section.
6. For increases by up to ten percent of the density or of the lower and upper end of the density range, whichever is appropriate, set forth in the comprehensive plan of such locality applicable to rezoning and special exception or, at the discretion of the local governing body, site plan and subdivision plat applications that request approval of nonelevator multiple family dwelling unit structures four stories or less in height when such applications are approved after the effective date of a local affordable housing zoning ordinance. However, at the option of the applicant, the provision pursuant to subdivision B 4 shall apply.
7. For a requirement that not less than six and one-quarter percent of the total number of dwelling units approved pursuant to a zoning ordinance amendment enacted pursuant to subdivision B 6 of this section shall be affordable dwelling units, as defined in the local zoning ordinance. In the event a ten percent increase is not achieved, the percentage of affordable dwelling units required shall maintain the same ratio of ten percent to six and one-quarter percent.
8. For reasonable regulations requiring the affordable dwelling units to be built and offered for sale or rental concurrently with the construction and certificate of occupancy of a reasonable proportion of the market rate units.

9. For standards of compliance with the provisions of an affordable housing dwelling unit program and for the authority of the local governing body or its designee to enforce compliance with such standards and impose reasonable penalties for noncompliance, provided that a local zoning ordinance provide for an appeal process for any party aggrieved by a decision of the local governing body.

C. Nothing contained in this section shall apply to any elevator structure four stories or above.

D. Any ordinance adopted hereunder shall provide that the local governing body shall have no more than 280 days in which to process site or subdivision plans proposing the development or construction of affordable housing or affordable dwelling units under such ordinance. The calculation of such period of review shall include only the time that plans are in review by the local governing body and shall not include such time as may be required for revision or modification in order to comply with lawful requirements set forth in applicable ordinances and regulations.

E. A locality establishing an affordable housing dwelling unit program in its zoning ordinance shall establish in its general ordinances, adopted in accordance with the requirements of § [15.2-1427](#) B, reasonable regulations and provisions as to any or all of the following:

1. For administration and regulation by a local housing authority or by the local governing body or its designee of the sale and rental of affordable units.

2. For a local housing authority or local governing body or its designee to have an exclusive right to purchase up to one-third of the for-sale affordable housing dwelling units within a development within ninety days of a dwelling unit being completed and ready for purchase, provided that the remaining two-thirds of such units be offered for sale exclusively for a ninety-day period to persons who meet the income criteria established by the local housing authority or local governing body or the latter's designee.

3. For a local housing authority or local governing body or its designee to have an exclusive right to lease up to a specified percentage of the rental affordable dwelling units within a development within a controlled period determined by the housing authority or local governing body or its designee, provided that the remaining for-rental affordable dwelling units within a development be offered to persons who meet the income criteria established by the local housing authority or local governing body or its designee.

4. For the establishment of jurisdiction-wide affordable dwelling unit sales prices by the local housing authority or local governing body or the latter's designee, initially and adjusted semiannually, based on a determination of all ordinary, necessary and reasonable costs required to construct the affordable dwelling unit prototype dwellings by private industry after considering written comment by the public, local housing authority or advisory body to the local governing body, and other information such as the area's current general market and economic conditions, provided that sales prices not include the cost of land, on-site sales commissions and marketing expenses, but may include, among other costs, builder-paid permanent mortgage placement costs and buy-down fees and closing costs except prepaid expenses required at settlement.

5. For the establishment of jurisdiction-wide affordable dwelling unit rental prices by a local housing authority or local governing body or its designee, initially and adjusted semiannually, based on a determination of all ordinary, necessary and reasonable costs required to construct and market the required number of affordable dwelling rental units by private industry in the area, after considering written comment by the public, local housing authority, or advisory body to the local governing body, and other information such as the area's current general market and economic conditions.

6. For a requirement that the prices for resales and rerentals be controlled by the local housing authority or local governing body or designee for a period of fifty years after the initial sale or rental transaction for each affordable dwelling unit, provided that the ordinance further provide for reasonable rules and regulations to implement a price control provision.

7. For establishment of an affordable dwelling unit advisory board which shall, among other things, advise the jurisdiction on sales and rental prices of affordable dwelling units; advise the housing authority or local governing body or its designees on requests for modifications of the requirements of an affordable dwelling unit program; adopt regulations concerning its recommendations of sales and rental prices of affordable dwelling units; and adopt procedures concerning requests for modifications of an affordable housing dwelling unit program. Members of the board, to be ten in number and to be appointed by the governing body, shall be qualified as follows: two members shall be either civil engineers or architects, each of whom shall be registered or certified with the relevant agency of the Commonwealth, or planners, all of whom shall have extensive experience in practice in the locality; one member shall be a real estate salesperson or broker, licensed in accordance with Chapter 21 (§ 54.1- 2100 et seq.) of Title 54.1; one member shall be a representative of a lending institution which finances residential development in the locality; four members shall consist of a representative from a local housing authority or local governing body or its designee, a residential builder with extensive experience in producing single-family detached and attached dwelling units, a residential builder with extensive experience in producing multiple-family dwelling units, and a representative from either the public works or planning department of the locality; one member may be a representative of a nonprofit housing organization which provides services in the locality; and one citizen of the locality. At least four members of the advisory board shall be employed in the locality.

8. The sales and rental price for affordable dwelling units within a development shall be established such that the owner/applicant shall not suffer economic loss as a result of providing the required affordable dwelling units. "Economic loss" for sales units means that result when the owner or applicant of a development fails to recoup the cost of construction and certain allowances as may be determined by the designee of the governing body for the affordable dwelling units, exclusive of the cost of land acquisition and cost voluntarily incurred but not authorized by the ordinance, upon the sale of an affordable dwelling unit.

(1990, c. 834, § 15.1-491.9; 1991, c. 599; 1992, c. 244; 1993, c. 437; 1994, cc. 88, 679; 1996, cc. 233, 426; 1997, cc. 587, 607.)